No. 88-1692

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED BUILDERS, INC.,
Petitioner,

v.

CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,

v.

TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,

v.

HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Rule 22.6, petitioners submit this Supplemental Brief to invite the Court's attention to a recent decision bearing directly on the questions raised in their

pending petition. The recent decision is *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 57 U.S.L.W. 4539 (U.S. May 15, 1989).[1] There, as here, the lower court was faced with the question whether to follow a previous decision of this Court construing the particular statutory language at issue; and there, as here, the lower court determined not to follow this Court's decision.

In response, all nine Justices of this Court concluded that the lower court had erred. Five Justices concluded (through an opinion by Justice Kennedy) that when a lower court has before it "a precedent of this Court [that] has direct application in a case," the lower court "should follow the case" even where it "appears to rest on reasons rejected in some other line of decisions." *Id.* at 4541. The "prerogative of overruling" one of this Court's decisions, Justice Kennedy wrote, belongs to this Court alone. *Id.*

The other four Justices of this Court (through an opinion by Justice Stevens) disapproved the lower court's action in even stronger terms. These Justices labeled that action "an indefensible brand of judicial activism." *Id.* (Stevens, J., dissenting). They concluded that "'[A]fter a statute has been construed . . . by this Court . . . it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself.'" *Id.* at 4541 n.1.[2] "'This position,'" Justice Stevens wrote, "'reflects both respect'" for the legislature's role and "'the compelling need to preserve the

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[1] The decision was handed down after the petition was filed in these cases and became known to petitioners' counsel the day petitioners' reply brief was filed.

[2] *Quoting Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part and dissenting in part).

courts' limitd resources.' "[3] Accordingly, once an "earlier opinion [of this Court] gives a statutory provision concrete meaning," it is for the legislature to amend that provision if it disagrees with that meaning. *Id.* at 4541. And, when the legislature does not amend the provision, the judiciary's "duty to respect" the legislature's work product "is strikingly similar to the duty of other federal courts to respect [the Supreme Court's] work product." *Id.*

The foregoing principles—joined in varying degrees by all Members of this Court in *Rodriguez*—apply with special force to these cases. As we showed in our petition, the D.C. Court of Appeals has in these cases refused to follow the "concrete meaning" which this Court in *WMATA v. Johnson*, 467 U.S. 925 (1984), gave to the statutory language here at issue. And the lower court refused to adhere to that "concrete meaning" even though neither the Congress nor the D.C. Council has chosen to amend the language at issue as it applies to the District of Columbia. As the *Rodriguez* case makes clear, such a refusal "constitutes an indefensible brand of judicial activism," a disrespect to the legislatures' prerogative, a disrespect to the work product of this Court, and a threat to the "compelling need to preserve the courts' limited resources." For these reasons alone, the present cases merit this Court's attention.

We recognize, of course, that Justice Stevens' opinion spoke of the respect that "other *federal* courts" owe to this Court. 57 U.S.L.W. at 4541 (emphasis supplied). The central question raised by these cases is whether the D.C. Court of Appeals in fact owes this Court *less* respect than that owed it by the federal district courts and courts of appeals. The Court should grant certiorari to resolve that question in these cases.

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[3] *Quoting McMahon*, 482 U.S. at 268 (citing *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 257-58 (1970) (Black, J., dissenting) and B. Cardozo, *The Nature of the Judicial Process* 149 (1921)).

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